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MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

WILLIAM ALLEN WHITEN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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INDEX

PAGE

Opinion Below 1

Jurisdiction 2

Questions Presented 2

Statement of the Case 2

Reasons for Granting the Writ 5

The trial court erred in allowing highly prejudicial remarks of the Assistant United States Attorney during closing argument to stand over objection of defense counsel 5

Appendix 11

Order of the Court of Appeals 11

Opinion of the Court of Appeals 13

Judgment and Order of Court of Appeals Denying the Petition for Rehearing 15

CASES CITED

Berger v. *United States*, 295 U.S. 78 (1935) 9

Dugan Drug Stores Inc. v. *United States*, 326 F. 2d 835 (5th Circuit, 1964) 8

Dunn v. *United States*, 307 F. 2d 883 (5th Circuit 1962) 8

Ginsberg v. *United States*, 257 F. 2d 950 (5th Circuit 1958) 8

Handford v. *United States*, 249 F. 2d 295 (5th Circuit 1957) 7, 9

Nalls v. *United States*, 240 F. 2d 707 (5th Circuit 1957) 8

United States v. *Georgia*, 210 F. 2d 45 (3rd Circuit 1954) 7

Viereck v. *United States*, 318 U.S. 236 7

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UNITED STATES OF AMERICA,

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PETITION FOR A WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner, William Allen Whiten, respectfully prays that a Writ of Certiorari issue to review the Judgment and Order of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on April 5, 1973.

OPINION BELOW

The Opinion and Order of the Court of Appeals, not yet reported, appears in the Appendix hereto at Pages —— to ——. No Opinion was rendered by the District Court for the Northern District of Mississippi.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on April 5, 1973. A timely Petition for Rehearing was denied on June 6, 1973, and this Petition for a Writ of Certiorari was filed within thirty days of that date. This Court's jurisdiction is invoked under 28 U.S.C., Section 1254 (1).

QUESTION PRESENTED

Whether the trial court erred in allowing highly prejudicial remarks of the Assistant United States Attorney during closing argument to stand over objection of defense counsel.

STATEMENT OF THE CASE

A Five-Count Indictment was returned against the Appellant and Co-Defendants:

> Count I charged that the Defendants did conspire among themselves with one Edward Joseph Fells to commit an offense against the United States in violation of Section 371, Title 18, U.S. Code; that they transported stolen automobiles in interstate commerce, knowing them to be stolen in violation of Section 2312 U.S. Code, and to receive, store, sell and dispose of said vehicles in violation of Section 2313, Title 18, U.S. Code;
>
> Count III charged William Allen Whiten with transporting a stolen vehicle in interstate commerce knowing the said vehicle had been stolen in violation of Section 2312, Title 18, U.S. Code;
>
> Count IV charged Charles Douglas Whitty with transporting a stolen vehicle in interstate commerce knowing the said vehicle had been stolen in violation of Section 2312, Title 18, U.S. Code;

Count V charged Harry Lee Keller with transporting a stolen vehicle in interstate commerce knowing the said vehicle had been stolen in violation of Section 2312, Title 18, U.S. Code.

After a trial by jury, the Defendants were found guilty of the charges enumerated in the indictment. The court denied all post-trial motions, entered judgment on the verdict and sentenced the Appellants to the custody of the Attorney General for the following periods of time: Charles Douglas Whitty, two years; William Allen Whiten, four years and Harry Lee Keller, five years. The Defendants were sentenced to the same period of time in consistence on both conspiracy and substantive counts, and sentenced to form concurrent.

This Appeal is from the above judgment and sentencing.

The facts are as follows:

In the early part of September of 1971 in Chicago, Illinois, four automobiles were stolen. These vehicles were: a 1967 Chevrolet BelAire serial number 156697J276540; a 1967 Ford LTD, serial number 7C6211223961; a 1967 Chevrolet Impala, serial number 164697J290255; and a 1968 Buick Skylark, serial number 444378330919.

The defendants and government witness, Edward Fells, drove four automobiles from Chicago, Illinois to Memphis, Tennessee.

These four men on October 25 or 26, 1971, brought the four cars into Westwood Motors in Memphis, Tennessee. Harry Keller acted as spokesman for the group, as there were negotiations entered into with the manager of Westwood Motors, Philip Thomas, for sale of the cars.

On October 26, 1972 four men drove a Buick Skylark into Tri-State Auction located in De Sota County Mississippi. Mr. Keller then spoke to Imogene Waldrup and requested to register and sell the car in the name of Al's Westwood Motors whose permission he had previously obtained. Mrs. Waldrup, appearing for the government at the trial, contradicted Mr. Thomas' testimony when she testified that she had spoken to an unidentified person at Westwood Motors who had confirmed that Mr. Keller had permission to register and sell the vehicles in the name of Westwood Motors. Mr. Keller and his companions left and returned later in the day with three other cars and presented titles on the four cars, which were subsequently registered and a bill of sale was prepared. The title of the 1967 Chevrolet driven by Mr. Whiten was in his own name.

Investigator A. D. Gatewood of the Auto Theft Bureau of the Mississippi Highway Patrol and Agent James M. Botting of the Federal Bureau of Investigation took the four cars and compared the public vehicle identification number on the bodies of the cars. The comparison results showed that the public vehicle numbers and the confidential numbers differed.

Mr. Fells, while testifying for the government testified that he had been hired to drive the 1967 Chevrolet BelAire from Chicago to Memphis by Harry Keller. He further stated that nobody told Mr. Fells that the cars were stolen, he just figured that they were stolen. He was given three years probation for testifying in the instant case and was allowed to plead guilty in Chicago. As far as he knew, Mr. Whiten was driving his own car down there.

Following their arrest, the defendants each made statements, which denies any guilty knowledge.

ARGUMENT

I.

THE TRIAL COURT ERRED IN ALLOWING HIGHLY PREJUDICIAL REMARKS OF THE ASSISTANT UNITED STATES ATTORNEY DURING CLOSING ARGUMENT TO STAND OVER OBJECTION OF DEFENSE COUNSEL.

During closing argument the Assistant United States Attorney argued:

> "Now, the individual that got up there on the stand by the name of Fells, he got up there, he was scared, he stated to you the facts of the case as he knew it. He didn't want to implicate anyone else. He was afraid to implicate anyone else, I submit to you. He got up there, he had to face the people, that he came down with. He wasn't thinking about justice in Mississippi, he was thinking about the streets in Chicago."

Defense counsel for Mr. Whiten objected and was overruled.

The government argues that this argument was evoked by the following:

> (1) A question of defense counsel for Mr. Keller to witness Fells: "You were afraid to come down here to Mississippi, to come before this Court, weren't you, and to go to trial in this case?"
>
> (2) An argument by counsel for Mr. Whiten that: "And if you listen to the testimony of Mr. Fells, he pled guilty for one reason, he was afraid to come down here and face trial in front of you all. He was afraid to come to Mississippi and stand in front of you all and say, 'I didn't know the cars were stolen.'"

The government does not deny that the argument made by the Assistant United States Attorney was improper, but argued instead that it was justifiable because it was induced by argument of the defense. This position cannot stand because the only point raised by the defense was that Fells pled guilty in Chicago instead of standing trial in Mississippi. No attention was called to the fact that he was afraid to testify. The defense was merely endeavoring to call to the attention of the jury the highly unusual disposition on this case which allowed Fells to plead guilty in Chicago for three years probation while the other three defendants had to travel from Chicago to Clarksdale, Mississippi for trial. The defense was endeavoring to demonstrate to the jury that Fells had received leniency in return for his testimony and to demonstrate the inherent bias existing in such "accomplice" testimony. In fact, the Court instructed the jury to be cautious of such testimony when he gave them the cautionary "accomplice" instruction.

At no point did any defense counsel raise the question of Fells' fear of testimony. Certainly there was nothing in the record to justify a prosecutor making such a volatile argument. The government has placed in the minds of the jury the idea that the defendants were capable of directly or indirectly causing violent harm to the person of Fells in retaliation for having testified against them in the instant case.

What has occurred, in fact, is that the government, obviously upset at the weak testimony of Fells, had determined to overcome that testimony by inflaming the minds of the jury against the defendants. Such indulgence by a prosecutor in an appeal wholly irrelevant to any facts or issues in the case, the purpose and effect

of which could only have been to arouse passion and prejudice, is reversible error. *Viereck* v. *United States,* 318 U.S. 236, 247.

This Court in *Handford* v. *United States,* 249 F. 2d 295 (5th Cir. 1957) held that in prosecution for illegal possession of non-tax paid whiskey, argument of United States attorney that he had "too many of his friends" and his "friends' children get run over, up and down the highways" is reversible error. This Court stated:

> "Handford was indicted only for possession of non-tax paid whiskey. That is all. He is not charged with responsibility for highway accidents, generally, or to the prosecutor's friends or to the children of the prosecutor's friends. Such an argument is an improper appeal to the sympathy of jurors for highway accident victims, especially children; to the natural prejudice of jurors against drunken drivers responsible for highway accidents, especially accidents to children. There is no inferable connection between the case against Handford and the highway accident toll . . ."

In the case of *United States* v. *Georgia,* 210 F. 2d 45 (3rd Circuit 1954), the Court held that a statement by the Assistant U.S. Attorney in a prosecution of a defendant for conspiracy to defraud the United States in administration of immigration laws that she reduced the quota coming from her country and prevented someone else of the thousands seeking entry from entering. Despite an attempt by the Court to correct this error by curative instruction, it was held to be prejudicial error.

This Court has consistently held that in a criminal prosecution a United States Attorney has a double burden—the obligation to conduct the government's case zealously and the obligation to try that case fairly and

with due regard to the rights of the accused. *Dugan Drug Stores, Inc.* v. *United States,* 326 F. 2d 835 (5th Circuit, 1964).

Such error as exists here cannot be removed by a curative instruction. An instruction to disregard such prejudicial statement has been held by this Court not to be sufficient to remove prejudice. In *Dunn* v. *United States,* 307 F. 2d 883 (5th Circuit 1962), this Court held that a closing argument that allegedly unreported income, on which prosecution for attempt to evade income tax was based, came from kickbacks paid by contractor to defendant as mayor, and to the effect that all politicians take kickbacks on contracts, was prejudicial error and could not be removed by a curative instruction.

How much more prejudicial was this statement which the Court allowed to go unchallenged even after timely objection by defense counsel. Such improper argument has been held to be plain error under Rule 52 (b), 18 U.S.C.A. *Ginsberg* v. *United States,* 257 F. 2d 950, (5th Circuit 1958); *Nalls* v. *United States,* 240 F. 2d 707 (5th Circuit 1957). If such error is reversible as plain error, then indeed it must be reversible error when properly preserved by timely objection.

As the Court states in *Dugan Drug Stores, Inc.* v. *United States,* 326 F. 2d 835, 837 (5th Circuit 1964):

> "We are not impressed with the argument that the conduct of the prosecutor was caused by the conduct of defense counsel. A prosecutor should be immune to improper tactics. If he feels that his opponent has overslipped, the remedy is an appeal to the trial court—not in the adoption of unfair procedures. The sufficiency of the evidence to establish guilt does not cure misconduct."

In the instant case the argument of the prosecutor for the government was not in response to any argument by the defense, but in fact, was an attempt to explain away the weak testimony of the only witness who could establish the element of knowing transportation which was in issue. In addition, the prosecutor established an inference in the minds of the jury that these defendants were immediately capable of heinous crimes of violence, in addition to the one which they stood accused, and in so doing forgot the admonition of this Court in *Handford* v. *United States*, supra at page 296:

> "A United States district attorney carries a double burden. He owes an obligation to the government, just as any attorney owes an obligation to his client, to conduct his case zealously. But he must remember also that he is the representative of a government dedicated to fairness and equal justice to all and, in this respect, he owes a heavy obligation to the accused. Such representation imposes an overriding obligation of fairness so important that Anglo-American criminal law rests on the foundation: better the guilty escape than the innocent suffer. In this case zeal outran fairness. The argument of the United States attorney in the district court was improper, prejudicial, and constituted reversible error."

The prosecutor has struck the foul blow prohibited by *Berger* v. *United States*, 1935, 295 U.S. 78 and has attempted by unfair means to obtain a wrongful conviction and reversible error has resulted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1972

No. 72-3322

Summary Calendar

D. C. Docket No. CRD 72-7-S

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

CHARLES DOUGLAS WHITTY, WILLIAM A. WHITEN and HARRY LEE KELLER,

Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Mississippi

Before THORNBERRY, GOLDBERG, and RONEY, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Mississippi, and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

April 5, 1973.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 72-3322

Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

CHARLES DOUGLAS WHITTY, WILLIAM A. WHITEN and HARRY LEE KELLER,

Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Mississippi

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(April 5, 1973)

Before THORNBERRY, GOLDBERG and RONEY, Circuit Judges.

2 U.S.A. v. CHARLES DOUGLAS WHITTY, ETC.

PER CURIAM: AFFIRMED.[1] See Local Rule 21.[2]

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1. Appellants have alleged the following in this direct appeal from their criminal convictions: (1) the trial court erred in refusing to instruct the jury as to their theory of

defense in the language requested; (2) the trial court's charge on the effect of circumstantial evidence was insufficient; (3) appellants were prejudiced by the trial court's failure to comply strictly with Rule 30, F. R. Crim. P.; (4) appellants were prejudiced by the government's refusal to allow discovery until the day of their trial of transcriptions of oral statements they had made; (5) appellants were prejudiced by the prosecutor referring in his closing argument to what one of the witnesses, a co-defendant who had pled guilty, was thinking about at the time he testified; (6) each appellant was not proven guilty beyond a reasonable doubt; and (7) there was insufficient evidence from which the existence of a conspiracy could be found. Each of these points has been considered and found to be without legal merit.

2. See NLRB v. Amalgamated Clothing Workers of America, 5 Cir. 1970, 430 F. 2d 966.

IN THE

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 72-3322

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

CHARLES DOUGLAS WHITTY, WILLIAM A. WHITEN and HARRY LEE KELLER,

Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Mississippi

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ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion April 5, 1973, 5 Cir., 1973, —— F. 2d ——).

(June 6, 1973)

Before THORNBERRY, GOLDBERG and RONEY, Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.